No. 81896-7

SUPREME COURT OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

RESPONDENT'S ANSWER TO BRIEF OF *AMICI CURIAE* WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION & AMERICAN ASSOCIATION FOR JUSTICE

Tim J. Filer, WSBA No.16285
Jeffrey S. Miller, WSBA No. 28077
Neil A. Dial, WSBA No. 29599
Emanuel Jacobowitz, WSBA No. 39991
Attorneys for Respondent

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile No.: (206) 447-9700

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I. INTRODUCTION

Respondent Chevy Chase Bank, F.S.B. ("Chevy Chase") respectfully answers the brief of *amici curiae* Washington State Association For Justice Foundation and the American Association For Justice (the "*Amicus* Brief").

The United States Supreme Court clarified two years ago that under Fed. R. Civ. P. 12(b)(6), an action must be dismissed for failure to state a claim unless, as required by Fed. R. Civ. P. 8, the plaintiff alleges facts showing a claim that is "plausible on its face," not merely "conceivable." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In May 2009, the United States Supreme Court further clarified that *Twombly* applies in "all civil actions." *Ashcroft v. Iqbal*, --U.S.--, 129 S. Ct. 1937, 1953, 173 L.Ed.2d 868 (2009) (quoting Fed. R. Civ. P. 1).

Notwithstanding that many states operating under the civil rules have already followed *Twombly*, *Amici* ask this Court to hold that the national standard is incompatible with Washington's Constitution, civil rules, or public policy. *Amicis'* arguments are not supported by established federal and state jurisprudence and should not guide this Court.

Amici misread the Washington Constitution's guaranty of access to the courts. The right to access does not mean that a plaintiff who has no claim may use discovery to fish for one. If it meant that, CR 12(b) would be unconstitutional, and CR 8 and CR 9 would have no force. *Twombly* does not impair access to the courts, it merely clarifies valid civil rules.

Amici are equally wrong to assert that the Washington Civil Rules, unlike the Federal Rules of Civil Procedure, provide protections that make a clear pleading standard unnecessary. The relevant federal and state rules are substantively identical, and Rules 8 and 12(b)(6) are a crucial part of both systems.

Similarly, *Amici* wrongly claim that concerns about litigation costs are "foreign" to Washington's courts. Petitioners' complaint, styled as a nationwide class action, raises the exact same concerns in Washington State as in Washington, DC: litigants and the courts should not be burdened by massive lawsuits that do not allege any plausible claim.

Finally, *Amici* err when they say that the *Twombly* standard is unclear. The standard requires a plaintiff to allege facts that, if proved, would make it at least plausible that he has a right to relief. This is not a difficult standard to understand. Nor is it a difficult standard to satisfy. Petitioners' failure to plead is a defect in their case, not in the standard.

In short, *Twombly* is entirely consistent with – and furthers – Washington law and policy. Chevy Chase urges this Court to adopt the national standard for Rule 12(b)(6) motions, and affirm the decisions below.[1]

II. STATEMENT OF THE CASE[2]

Petitioners, the McCurrys, allege as fact that when they paid off their home loan from Chevy Chase, Chevy Chase charged them a notary fee and a fee for faxing their loan payoff statement. CP 4-5. They assert the legal conclusion that their Deed of Trust did not secure such fees or allow Chevy Chase to charge such fees. CP 4-5, 7-8. They claim that Chevy Chase, by charging these fees and including the fees on the payoff statement, breached the Deed of Trust or used a deceptive trade practice. CP 6-9.

The Superior Court of King County granted Chevy Chase's motion under CR 12(b)(6) to dismiss the McCurrys' claims as preempted, because federal law exclusively governs what fees a federal thrift may charge and how it must disclose them. The Court of Appeals affirmed the dismissal.

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[1] As set forth in Respondent's principal briefs, the lower courts' decisions should be upheld even if this Court does not reach the *Twombly* issue.

[2] The facts of this case are more fully set forth in Respondent's principal briefs and are summarized here for the Court's convenience.

Searching for some colorable variation of their claims that might not be preempted, the McCurrys ask the courts to speculate that Chevy Chase might not really have incurred the notary expenses for which it charged the McCurrys.[3] There is no such allegation in the Complaint. The McCurrys did not try to amend their complaint to include that imaginary fact. They merely argued that the motion to dismiss should be denied because that "hypothetical fact" could exist. See Appellant's Brief 27-28. The trial court and Division I both properly rejected that speculation, without following *Twombly*. *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wn. App. 900, 904-05 & n.1, 193 P.3d 155 (2008).

III. ARGUMENT

A. The *Amicus* Brief Does Not Challenge The Decisions Below.

Washington courts have long recognized that federal court interpretations of the federal civil rules are highly persuasive as to the meaning of Washington's civil rules. *Sanderson v. University Village, L.P.*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999). Therefore, Washington, like the rest of the nation, followed the standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts

[3] Chevy Chase shows in its initial appellate brief that a claim based on such facts would still be preempted and dismissed. Resp. Br. at 35-50.

in support of his claim which would entitle him to relief." *Sherwood v. Moxee School Distr. No. 90*, 58 Wn.2d 351, 354, 363 P.2d 138 (1961) (quoting *Conley*). Using that standard, "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977) (emphasis added) (affirming dismissal).

As shown in Respondents' other appellate briefs, the McCurrys' claims are all preempted by express federal law, because state law claims may not be used to control the way federal thrifts charge fees. The McCurrys therefore fail to state a claim upon which relief may be granted, as required by CR 12(b)(6). Where, as here, a pleading is clear and understandable but is legally unsound, neither *Conley*, nor Washington's "hypothetical facts" doctrine based on *Conley*, let the plaintiff make up new claims on appeal without amending the complaint. The Superior Court and the Court of Appeals therefore correctly dismissed the claim even without applying the *Twombly* standard. *Amici* do not argue with this result, but instead argue that the *Twombly* standard should not be followed.

Under *Twombly*, it is even more obvious that the McCurrys fail to state a claim. In *Twombly*, the U.S. Supreme Court expressed concern that *Conley* could be misread to prevent dismissal of "a wholly conclusory

statement of claim" that "left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery" – precisely the misreading that the McCurrys ask for. *Twombly*, 550 U.S. at 561. A plaintiff must allege at least the bare facts that, if proved, would entitle him to relief. *Id.* at 556-57. The *Twombly* Court recognized that in practice, courts do not generally read *Conley* so literally, and do require a plaintiff to state the grounds upon which his claim rests. *Id.* at 562. Even so, the Court retired the confusing language of *Conley*, and held that Rules 8 and 12 mean that plaintiffs must allege facts that "nudge[] their claims across the line from conceivable to plausible." *Id.*[4] *Twombly* should be followed in Washington.

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[4] Most state courts to have addressed the issue recognized the wisdom of the new federal approach, and adopted the *Twombly* standard. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879, 890 (Mass. 2008); *Feeney v. Dell Inc.*, 454 Mass. 192, 908 N.E.2d 753, 771 (Mass. 2009); *Tuban Petroleum, L.L.C. v. SIARC, Inc.*, 11 So.3d 519, 523 (La. App. Ct.), *writ den.*, 9 So.3d 877 (La. 2009); *Bahr. v. Capella Univ.*, 765 N.W.2d 428, 436-37 (Minn. Ct. App.), *rev. granted*, 765 N.W.2d 428 (Minn. 2009); *Gallo v. Westfield Nat. Ins. Co.*, 2009 WL 625522, *2 (Ohio Ct. App. Mar, 12, 2009); *Hermosa Holdings, Inc.* v. *Mid-Tenn. Bone And Joint Clinic, P.C.*, 2009 WL 711125, *3 & n.5, *10 (Tenn. Ct. App. Mar. 16, 2009); *Espinosa v. Jefferson/Louisville Metro Gov't*, 2009 WL 277488, *1 (Ky. Ct. App. Feb. 6, 2009); *Sisney v. Best, Inc.*, 2008 SD 70, 754 N.W.2d 804, 811 (S.D. 2008); *BASF Corp. v. POSM II Prop. P'ship, L.P.*, 2009 WL 522721 (Del. Ch. Mar. 3, 2009). (The unpublished opinions herein are citable under GR 14.1 because they may be cited in their originating jurisdictions. *See* Ohio Rep. R. 2; Tenn. Ct. App. R. 12; Ky. CR 76.28; Del. Ch. Ct. R. 171. Copies of these opinions are appended

B. Civil Rules 8 and 12 Do Not Block Access To Justice.

There is no constitutional right to a court rule. Washington's rules are controlled by the courts. Yet *Amici* urge this Court to hold that the *Twombly* issue has "a state constitutional access to justice dimension," under Washington Const. Art. 1 § 10, which grants Washington residents the right of access to the courts. *Amicus* Brief 14-15. *Amici* primarily rely on *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) to argue that Art I § 10 entitles the McCurrys to conduct discovery. *John Doe* simply stands for the unremarkable proposition that the right to access includes "discovery authorized by the civil rules, subject to the limitations contained therein." *Id.* (emphasis added). The "civil rules" do not authorize discovery by a party who fails to state a claim. Quite the contrary, Rules 8 and 12 expressly require a party to plead a claim or face dismissal. Civil Rule 9 requires a higher pleading standard for certain claims, and yet is constitutional. There is no constitutional right to ignore the civil rules of procedure.

The *Twombly* standard simply gives clearer effect to CR 8's threshold pleading requirement. Courts should not delegate their vast discovery powers to a litigant who has no plausible right to relief. *See*

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to Respondent's Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers.)

Twombly, 550 U.S. at 559 (courts "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed") (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)).

C. The *Twombly* Standard Furthers The Aims Of CR 8.

While the Civil Rules are construed together, the Court will not look to one rule to avoid the plain language of another rule. *Amicis'* argument would effectively read CR 8 out of the Civil Rules. They argue that Washington should not apply the *Twombly* standard under CR 8 because Washington courts can manage discovery under CR 16(a) and CR 26(c), Washington lawyers must certify pleadings under CR 11(b)(3), and Washington defendants may move for a more definite statement under CR 12(e) or for summary judgment under CR 56. *Amicus* Brief 9-13. Although these protections may help avoid abuse, Washington has also imposed CR 8's pleading requirements.

Washington courts do not drift from federal standards in interpreting identical court rules. *Amici* suggest it should do so now because while the federal courts need substantive complaints, Washington courts do not, in light of the existing protections against abusive pleading and discovery. Yet the Federal Rules of Civil Procedure provide just the same other protections, and still need an effective Rule 8. *See* Fed. R.

Civ. P. 26(c), 16(b)(3)(B), 11(b)(3), 12(e), 56. None of these protections help Chevy Chase here:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries"; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.

Twombly, 550 U.S. at 559 (internal citations omitted). Similarly, Rule 12(e) and Rule 11 would not help Chevy Chase if the McCurrys could impose discovery costs without even having to plead and certify their key facts.

Twombly is also consistent with Washington's CR 8. *Amici* rely on the irrelevant fact that CR 8 does not share the requirement of Fed. R. Civ. P. 8(a)(1) that a plaintiff state the grounds for the court's jurisdiction. *Amicus* Brief at 11-12. But the *Twombly* Court did not interpret Fed. R. Civ. P. 8(a)(1). It did not even address that provision. The Court relied on Fed. R. Civ. P. 8(a)(2), which states in relevant part:

> A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 8(a)(2) (emphasis added).

> Washington's relevant provision is virtually identical:
>
> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief.

CR 8 (emphasis added).

It is this shared language that in federal courts and many state courts imposes a "threshold requirement that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 545 (quoting Fed. R. Civ. P. 8(a)(2). To the extent that *Conley* appears to be inconsistent with that CR 8 threshold pleading requirement, it should not be followed. The McCurrys' distorted version of *Conley*, not the U.S. Supreme Court's opinion in *Twombly*, is at odds with CR 8. The McCurrys' interpretation would leave Chevy Chase and the courts to guess at their claims. CR 8 requires more.

D. Washington State Shares Federal Concerns About Case Management And Litigation Costs.

Complex litigation, like the putative, nationwide class action in this case, is costly and risky to defend. *Twombly*, 550 U.S. at 558. The substantial burden of discovery in national class actions "will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 559. Yet *Amici* argue that *Twombly* "reflects an

elevated concern for case management and cost considerations foreign to Washington jurisprudence." *Amicus* Brief at 4. This is not so.

There is no support for the notion that concerns about case management and litigation costs are "foreign" to Washington. The costs and expenses of complex litigation, including the increasing burden of managing electronic discovery, are as great in Washington state court as in federal court. The *McCurry* lawsuit is just the kind of case that would result in significant costs and expenses were it to proceed beyond the pleading stage. A baseless lawsuit can tarnish credit and reputation. A baseless nationwide class action can bankrupt a company. Chevy Chase should not have to incur these costs – in the federal district court or a few blocks away at the King County Superior Court – unless the McCurrys can at least bring a plausible claim.

Amici concede "[t]here is no doubt that concerns about the cost and burden of discovery are present in Washington law." *Amicus* Brief 13. *Amici* understate this State's concerns. Civil litigation is sharply on the rise in Washington, burdening not only litigants, but the courts as well. Five years ago, Washington's Board For Judicial Administration reported a court funding crisis:

> Justice is in jeopardy in Washington state today. Trial courts are not adequately funded resulting in unequal justice and excessive delay. There are an insufficient

> number of judges and staff, offenders in some instances are not being accountable and children are placed at risk. . . . On all fronts, our system of justice in the trial courts is suffering a long and slow strangulation from lack of resources to the point where judges, attorneys, litigants, and the public no longer appreciate how an adequately funded system should operate. Justice in jeopardy is eroding trust and confidence in the courts.

Board For Judicial Administration Court Funding Task Force, *Justice in Jeopardy: The Court Funding Crisis in Washington State* 11 (December 2004).

Since then, the number of commercial civil litigation cases filed in Washington grew from 20,627 in 2006 to 25,782 in 2007 and 31,572 in 2008 – a 25% increase from 2006 to 2007 and a further 22% increase to 2008. *See Superior Court 2008 Annual Caseload Report,* http://www.courts.wa.gov/caseload/superior/ann/atbl08_wo_staffing.pdf.

This overload comes at a time when Washington state is facing one of the largest budget shortfalls in the country.

Justice Gerry L. Alexander recently analyzed the problem:

> [F]unding of our trial courts was not problematic in earlier times because our state's court system was relatively small and local governments did not have huge demands placed on their recourses. But as the years have gone by the number of cases flowing into our courts has risen dramatically as our population has increased and a variety of new laws and regulations have been enacted at the state and local level. . . . As a consequence, our trial courts have been severely challenged as they have endeavored to keep up with their increasing and more complex caseloads.

See Gerry L. Alexander, *State of the Judiciary – January 2009* 5, http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/ResourcesPubsReports.

> And the King County Superior Court reports that in 2008:
>
> King County faced a budget crisis of unprecedented proportions, the full extent of which only became apparent as the year progressed.
> **
> The court may have reached the point where further reductions will violate the court's mandate, which is to handle all court matters in a timely manner.

King County Superior Court—2008 Annual Report, http://your.kingcounty.gov/kcsc/docs/annualrpt08.pdf.

Plainly, concerns about the costs of civil litigation are as real in Washington state court as federal court. By requiring a plausible claim at the outset, CR 8 and CR 12(b)(6) provide an important tool against pointless litigation, and therefore help control the runaway costs that are swamping this state's court system.

E. *Twombly* Reduces Confusion And Provides Clear Guidance.

Amici lastly attack the *Twombly* standard as "undefined and imprecise." *Amicus* Brief at 17. This characterization more aptly describes *Amicis'* anything-goes approach to pleading. If the McCurrys could proceed based on facts they will not allege, Chevy Chase would not

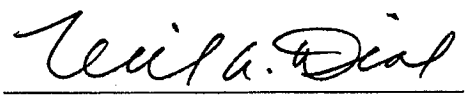
have fair notice of their claims. *Twombly* simply brings Rule 12(b)(6) in line with Rule 8. This Court should assess the McCurrys' complaint based on their complaint, not on their imagination. Neither Chevy Chase nor the Superior Court should have to expend resources straining at "hypothetical facts" for plaintiffs who cannot or will not allege a plausible claim.

IV. CONCLUSION

Because the Petitioners' failure to state a claim is even more obvious under the national pleading standard, which is consistent with Washington law, Respondent respectfully renews its request that this Court affirm the dismissal of this action.

RESPECTFULLY SUBMITTED this 29th day of October, 2009.

FOSTER PEPPER PLLC



Timothy J. Filer, WSBA #16252
Jeffrey S. Miller, WSBA No. 28077
Neil A. Dial, WSBA #29599
Counsel for Respondent

DECLARATION OF SERVICE

I, Neil A. Dial, declare as follows:

I am one of the Attorneys for Chevy Chase Bank, F.S.B. and am a resident of the State of Washington, residing and employed in Seattle, Washington.

I am over the age of eighteen years old and am not a party to the above-titled action. My business address is 1111 Third Avenue, Suite 3400, Seattle, Washington 98101.

On October 29, 2009, 2009, I caused the following documents to be served on the parties:

(1) Respondent's Answer To Brief Of Amici Curiae Washington State Association For

Justice Foundation & American Association For Justice;

(2) Respondent's Answer To The Amicus Curiae Brief Of The State Of Washington; and

(3) this Declaration of Service:

in the manner noted:

Attorneys for Plaintiffs/Petitioners
Guy W. Beckett
BERRY & BECKETT, PLLP
1708 Bellevue Ave.
Seattle, WA 98122-2017
Phone: (206) 441-5444
Fax: (206) 838-6346
Email: gbeckett@beckettlaw.com

☒ Via U.S. Mail
☐ Via Facsimile
☐ Via Messenger
☒ Via Email

Attorneys for Plaintiffs/Petitioners
Rob Williamson
Williamson & Williams
187 Parfitt Way SW, Suite 250
Bainbridge Island, WA 98110
Phone: 206-780-4447
Fax: 206-780-5557
Email: roblin@williamslaw.com

☒ Via U.S. Mail
☐ Via Facsimile
☐ Via Messenger
☒ Via Email

Attorneys for Plaintiffs/Petitioners
Mr. Mark A. Griffin
Keller Rohrback LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Phone: (206) 623-1900
Fax: (206) 623-3384
Email: mgriffin@kellerrohrback.com

☒ Via U.S. Mail
☐ Via Facsimile
☐ Via Messenger
☒ Via Email

Attorneys for Washington Defense Trial Lawyers
Stewart A. Estes
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Ave., Ste. 4141
Seattle, WA 98104
Phone: (206) 623-8861
Fax: (206) 223-9423
Email: sestes@dbmlawyers.com

☒ Via U.S. Mail
☐ Via Facsimile
☐ Via Messenger
☒ Via Email

Attorneys for Washington State Association for Justice Foundation George M. Ahrend Dano Gilbert & Ahrend PLLC P. O. Box 2149 Moses Lake, WA 98837 Phone: (509) 764-8426 Fax: (509)766-7764 Email: gahrend@dgalaw.com	☒ Via U.S. Mail ☐ Via Facsimile ☐ Via Messenger ☒ Via Email
Attorneys for Washington State Association for Justice Foundation Bryan P. Harnetiaux 517 E. 17th Avenue Spokane, WA 99203 Phone: (509) 624-3890	☒ Via U.S. Mail ☐ Via Facsimile ☐ Via Messenger ☐ Via Email
Attorneys for American Association for Justice Jeffrey R. White 777 Sixth Street NW, Suite 520 Washington DC 20001-3723 **Email: Jeffrey.White@cclfirm.com**	☒ Via U.S. Mail ☐ Via Facsimile ☐ Via Messenger ☒ Via Email

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 29th day of October 2009, in Seattle, Washington.

DATED this 29th day of October, 2009.

FOSTER PEPPER, PLLC

Neil A. Dial, WSBA No. 29599
Attorneys for Chevy Chase Bank, F.S.B